WT 05-194

Stamp and Return

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

March 15, 2005

Helgi C. Walker
202.719.7349
hwalker@wrf.com

BY HAND DELIVERY

Marlene H. Dortch,
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RECEIVED

MAR 15 2005

Federal Communications Commission
Office of Secretary

Re: Petition for Declaratory Ruling

Dear Ms. Dortch:

Enclosed please find an original and fourteen (14) copies, as well as a date stamped copy, of a Petition for an Expedited Declaratory Ruling, on behalf of the Cellular Telecommunications & Internet Association.

This petition seeks confirmation that: (1) early termination fees in wireless service contracts are "rates charged" for commercial mobile services within the meaning of Section 332(c)(3)(A) of the Communications Act and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful "liquidated damages" or penalties, constitutes prohibited rate regulation and is therefore preempted by Section 332(c)(3)(A).

Please do not hesitate to contact me with questions or concerns.

Sincerely,

Helgi Walker

Helgi C. Walker

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of the Cellular Telephone & Internet Association for an Expedited Declaratory Ruling Confirming that: (1) Early Termination Fees in Wireless Service Contracts Are "Rates Charged" for Commercial Mobile Services Within the Meaning of Section 332(c)(3)(A) of the Communications Act and FCC Precedent; and (2) Any Application of State Law by a Court or Other Tribunal to Invalidate, Modify, or Condition the Use or Enforcement of ETFs Based, in Whole or in Part, Upon an Assessment of the Reasonableness, Fairness, or Cost-basis of the ETF, or to Prohibit ~~the Use~~ or Enforcement of ETFs as Unlawful "Liquidated Damages" or Penalties, Constitutes Prohibited Rate Regulation and Is Therefore Preempted by Section 332(c)(3)(A)	)

To: The Commission

PETITION OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION FOR AN EXPEDITED DECLARATORY RULING

Michael Altschul
Senior Vice President, General Counsel
CTIA - The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Dated: March 15, 2005

EXECUTIVE SUMMARY

Most wireless carriers operate on a national or regional basis, offering a number of standard rate and service plans across a multi-state region or the entire country. Accordingly, a wireless subscriber in Pinpoint, Georgia can have access to the same handset, bucket of minutes, data services, and ancillary services as a subscriber on the Upper East Side of Manhattan. Early Termination Fees (or "ETFs") are central to the rates and rate structures of the most popular form of wireless service rate plan in the United States, fixed, longer-term subscriber agreements. ETFs facilitate innovative and consumer-friendly pricing by allowing carriers to spread large handset subsidies and customer acquisition costs over the entire life of what is typically a one-or two-year service contract. While most national carriers do offer month-to-month or prepaid wireless plans without ETFs, consumers overwhelmingly prefer the ETF-supported rate structure of the long-term plans with their lower initial and monthly payments. Without the availability of the ETF to mitigate losses from early service terminations, such plans would cease to exist in their present form. ETFs thus have produced lower overall wireless rates, substantially reduced economic barriers to entry for younger and lower-income wireless subscribers, and stimulated both wireless-to-wireless and wireless-to-wireline competition – to the benefit of *all* consumers of telecommunications services.

Despite the important consumer and competitive benefits inherent in rate structures that includes an ETF, a growing number of class action lawsuits have been brought in an attempt to use state law to invalidate this central component of popular national wireless rate plans. Though the complaints in these cases rely upon a pastiche of alleged violations of common-law equitable doctrines, or state "unfair competition" or "unfair trade practices" statutes, they all share one fundamental purpose and one fatal legal flaw. This basic purpose is to induce state

courts to use state law to declare invalid, modify, refund, reduce, adjust, condition, or flat out prohibit ETFs. The fatal legal flaw in this approach is obvious: state courts do not possess "any authority," 47 U.S.C. § 332(c)(3)(A), to undertake this regulatory task. If these lawsuits do not seek to use state law and state judicial power to "regulate ... the rates charged by any commercial mobile service," *id.*, then the words used by Congress in 1993 to protect wireless carriers from a patchwork of state rate regulation have no meaning.

At bottom, every one of these class actions is predicated on the notion that the ETF is "unfair," "excessive," "unconscionable," "unrelated to cost," or constitutes some form of "liquidated damages" prohibited by state law. These state lawsuits thus lie in the heartland of the preemptive force of Section 332(c)(3)(A) – they challenge *both* the overall price for wireless service *and* the way that market forces have structured that rate. These suits purport to assign state court judges and juries across the country the task of holding some alternative cost measure or other economic yardstick up against the wireless rate and rate structure chosen by the consumer in an arms-length transaction. Straightforward application of this Commission's prior statements, interpretations, and adjudications enforcing the text and purpose of Section 332(c)(3)(A) compels the conclusion that all of these attempts to use state law to "blue pencil" a critical part of the overall price of wireless service and the structure of wireless rates are preempted by Section 332(c)(3)(A). If these regulatory initiatives are permitted to proliferate further without swift and decisive FCC guidance, they will harm consumers, wireless carriers, and competition in the broader telecommunications market.

The Commission's intervention is needed and it is needed quickly. State courts have misinterpreted Section 332(c)(3)(A) and, in turn, this Commission's precedents. Discovery is now going forward in some of these cases, and wireless carriers are being forced to produce cost

data, expert evaluations of their rates and rate structures, and economic justifications for the existence and size of the ETF. The fact that discovery in these cases closely resembles a traditional "cost of service" rate case under state regulation of intrastate wireline services powerfully illustrates why these lawsuits are nothing more than a form of the state rate regulation expressly preempted by Section 332. The time has come for the FCC to confirm and reaffirm its precedents – which already establish that state regulation of ETFs is prohibited rate regulation. The FCC should act swiftly and decisively to defend the deregulatory approach to wireless rates that both Congress and this Commission have recognized serves consumer interests and promotes the continued growth and health of the wireless industry.

For these reasons, discussed in detail below, the Cellular Telecommunications & Internet Association ("CTIA"),[1] on behalf of all commercial mobile service providers, respectfully petitions the Commission to issue a declaratory ruling confirming that: (1) ETFs are "rates charged" for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful "liquidated damages" or penalties, constitutes prohibited rate regulation and is therefore preempted by Section 332(c)(3)(A).[2]

---

[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. CTIA membership covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] CTIA notes the petition recently filed by SunCom Operating Company L.L.C., which seeks a similar declaration with respect to the state law challenges to SunCom's ETF set forth in a class action complaint pending before a South Carolina court. *See* Petition for Declaratory Ruling, *In re Clarification that Early Termination Fees Charged to Cellular Telephone Customers Are "Rates Charged" Within The Meaning of 47 U.S.C. § 332(c)(3)(A)*, No. 05-

Because many wireless carriers face the immediate prospect of "rate regulation" through discovery that is occurring now in some of these class actions (including discovery focused on the "cost-basis" of the ETF and expert depositions on the economic justification for the ETF), and because these lawsuits create uncertainty regarding every long-term wireless contract in the country, CTIA respectfully requests that the Commission set a short comment cycle for this Petition and consider and decide this Petition on an expedited basis.

_____ (filed Feb. 22, 2005); *see also Edwards v. SunCom*, State of South Carolina, County of Horry, Case No. 02-CP-26-3359 (Ct. of Com. Pleas. May 25, 2004) ("*S.C. Suncom Compl.*). However, the proliferation of similar lawsuits across the nation has generated a need for Commission guidance beyond a ruling on the specific facts and claims at issue in the SunCom petition. CTIA therefore seeks a declaratory ruling that will provide guidance to *all* courts asked to adjudicate claims that would use state laws to regulate wireless carriers' ETFs. CTIA respectfully requests that the instant Petition be consolidated with the SunCom petition for public comment and decision.

TABLE OF CONTENTS

I. BACKGROUND

Pursuant to Section 1.2 of the FCC's Rules,[3] CTIA respectfully requests that the Commission issue, on an expedited basis, a declaratory ruling confirming that: (1) ETFs are "rates charged" for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful "liquidated damages" or penalties, constitutes prohibited rate regulation and is therefore preempted by Section 332(c)(3)(A).[4]

A. Early Termination Fees Are an Essential Feature of the Modern Wireless Rate Plan.

The vast majority of wireless rate plans in this country involve service agreements with one- or two-year term commitments. Under these plans, customers agree to use and pay for service on a monthly basis for a fixed length of time, typically 12 or 24 months. Wireless providers' costs for acquiring and provisioning new customers are significant, but most of the rate plans offered by wireless providers do *not* require customers to pay for these costs at the beginning of the subscription term. Instead, carriers recover these "up front" costs gradually from customers through a variety of rate elements.

---

[3] 47 CFR § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

[4] This preemption includes state common-law equitable doctrines, as well as certain unfair and deceptive trade practices claims, and any other claim sounding in state law that requires an inquiry into the reasonableness, fairness, cost or other economic basis of an ETF itself and involves any prayer for relief that would eliminate, modify, alter, refund, condition or prevent collection or future use of any ETF in any wireless service contract.

ETFs are an essential part of these rate plans. An ETF is assessed when a wireless subscriber terminates service before the contract term expires. The ETF thus provides a measure of predictability to the revenue stream reasonably expected by wireless carriers, enabling carriers to offer attractive initial discounts and monthly pricing to customers willing to make a minimum service commitment and also ensuring carriers some measure of compensation for lost revenue and otherwise unrecoverable up front costs caused by early terminations.[5] Indeed, many rate plan options and prices offered by wireless carriers *depend* upon the existence of ETFs.[6]

B. State Courts Across the Country Are Currently Purporting to Exercise Supervisory Power Over Wireless Rates.

In putative class action lawsuits now pending in a number of jurisdictions, state courts are asserting the authority to adjudicate the validity, permissibility, and reasonableness of ETFs pursuant to state law.[7] Though the specific causes of action asserted in each case vary from state

---

[5] Early termination and cancellation charges are standard practice in many other types of contracts, including auto leases and mortgages. *See, e.g. Baez v. Banc One Leasing Corp.*, 348 F.3d 972, 973 (11th Cir. 2003) (discussing early termination fees in automobile leases); <http://www.freddiemac.com/singlefamily/pdf/ppm.pdf> (describing operation of prepayment charges in certain mortgages). *See Telephone Number Portability*, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20976 (¶ 14) (2003) ("Telephone Number Portability") (noting that ETFs allow wireless carriers to hedge against unmitigated customer migration and "recover[] their investment in their customers"); *see also In re Ryder Communications, Inc. v. AT&T Corp.*, File No. EB-02-MD-038, slip op. ¶ 33 (FCC rel. July 7, 2003) (wireline ETFs are "a valid quid pro quo for the rate reductions included in long term plans").

[6] Consumers are generally highly satisfied with these wireless offerings and the services provided by wireless providers. In fact, the FCC just recently announced that informal wireless complaints filed with the FCC recorded "a sharp decline" in the 4th quarter of 2004, dropping to 4,369 from 9,120.13. The FCC said billing and rate complaints led the way with a more than 50% decline. *See Quarterly Report on Informal Consumer Inquiries and Complaints Released*, 2005 WL 516803 (Mar. 4, 2005). Though, as the FCC indicates, "[t]he existence of a complaint does not necessarily indicate wrongdoing by the company at issue," *id.*, this report demonstrates that consumers' perceptions of their own welfare are improving dramatically in the area of wireless service, rates and billing.

[7] The following is a list of pending litigation challenging ETFs in state courts across the country. *California Cellphone Termination Fee Cases*, State of California, County of Alameda, Case No. JCCP004332 (Cal. Super Ct. Feb. 11, 2004); *Hellman v. T-Mobile, USA, Inc.*, State of

to state, at the heart of each suit is a challenge to the legality of the rates and rate structures used so successfully by wireless providers across the country. Courts across the country are being asked to invalidate these otherwise lawful rate elements, by holding various doctrines of state law up against the ETF and then determining whether the ETF itself or its size is "unfair," "unreasonable," or "unconscionable," or constitutes unlawful "liquated damages" under state law. In each case, plaintiffs seek a return of the payments made pursuant to the ETFs and in most cases they also seek a prohibition on the inclusion of ETFs in the rate structure of wireless pricing plans in the future. Thus, each case essentially amounts to an allegation that the ETF provided for in the wireless service contract and rate plan is "too high" or cannot exist at all.

1. California

There are several coordinated putative class actions against AT&T Wireless, Cingular, Nextel, Sprint, T-Mobile and Verizon Wireless currently pending in the Superior Court of California (Alameda County), all of which directly challenge ETFs under California law.[8] The

---

Florida, Palm Beach County, Case No. 50 2004 CA 005061 (15th Jud. Cir. Ct. May 17, 2004); *Brown v. Verizon Wireless Services, LLC*, State of Florida, Palm Beach County, Case No. 04-80606-CIV (15th Jud. Cir. Ct. May 17, 2004); *Carver Ranches Washington Park, Inc. v. Nextel South Corp. d/b/a Nextel Communications*, State of Florida, Palm Beach County, Case No. 50 2004 CA 005062 (15th Jud. Cir. Ct. May 17, 2004); *Graber v. AT&T Wireless PCS, LLC et al.*, State of Florida, Palm Beach County, Florida, Case No. 50 2004CA004650MB(AI) (15th Jud. Cir. Ct. March 7, 2005); *Molfetas v. Sprint Spectrum, L.P.*, State of Florida, Palm Beach County, Case No. 50 2004 CA-005317-CIV (15th Jud. Cir. Ct. May 25, 2004); *S.C. Suncom Compl*; *Hall v. Sprint Spectrum L.P., d/b/a Sprint PCS Group*, Case No. 04-L-113 (3d Jud. Cir. Ct. Feb. 2, 2004); *Lemaldi v. T-Mobile, U.S.A, Inc.*, State of Washington, King County, Case No. 05-2-04408-0, (Super. Ct. Feb. 2, 2004). Furthermore, an Illinois complaint has been referred to arbitration. *Zobrist v. Verizon Wireless, Cellco P'ship, Verizon Communications, Inc.*, American Arbitration Association No. 11 494 00324 05.

[8] *Cellphone Termination Fee Cases*, Case No. JCCP004332. The complaint filed against AT&T has been attached as Exhibit A, as a representative example of the substantially similar complaints in these cases. It will be referred to as "*Cal. AT&T Compl.*"

complaints assert state law claims under various equitable doctrines and statutory theories of liability, alleging that ETFs constitute unlawful penalties, unfair business practices, and unconscionable contract terms, and, as such, have unjustly enriched wireless carriers. The common basis for all of these claims is the allegation that the ETFs are not "reasonable" in relation to carriers' actual revenue losses from early termination. The remedies sought by the complaints reinforce this point: in addition to damages, plaintiffs demand restitution and disgorgement of ETFs already collected, as well as an injunction preventing wireless carriers from enforcing ETFs in existing rate plans or including ETFs in future rate plans.[9] The wireless carriers moved for dismissal of these claims on federal preemption grounds early in the litigation. The court declined to dismiss the complaints at the pleading stage and instead decided to address the preemption issue following discovery and, possibly, after a full trial.[10] As a result, the California cases are now in the discovery phase, with wireless carriers being forced to retain economic experts and develop cost data to "defend" an element of their rate structures under state law.[11]

---

[9] *See e.g., Cal. AT&T Compl.* at ¶¶ 11, 90.

[10] Order Overruling Demurrer to Early Termination Fee Claims Based on Preemption, *In re Cellphone Termination Fee Cases,* State of California, County of Alameda, Case No. JCCP004332, slip op. at 5 (Super. Ct. Jan. 20, 2004) (*California Order Overruling Demurrer*) [Order attach. as Exhibit B]. Although the court has indicated that it will decide the so-called "fact issues" it deems relevant to the preemption defense, it has also raised the specter of deferring to the jury if the latter's findings are inconsistent with those of the court. *See Order (1) Granting and Denying Motion of Defendants Regarding Conduct of Trial and (2) Resolving Issues Concerning Depositions of Expert Witnesses, entered February 14, 2005* [Order attach. as Exhibit C].

[11] The court underscored the difficulty state courts are having in properly interpreting and applying FCC precedent in denying the defendants' motions to dismiss, stating that "[t]he legal standard for the court to apply is unsettled" and that "[t]he decisions of the FCC do not address directly whether the states can regulate ETFs." *California Order Overruling Demurrer*, slip op. at 5. The Alameda County court thus contradicted a prior ruling by a state court judge in Los Angeles County dismissing an identical case on the ground that ETFs are indeed "rates" within the meaning of Section 332(c)(3)(A) and that state law challenges to ETFs are thus preempted.

2. Florida

Wireless carriers' ETFs are also the target of putative class actions filed in Palm Beach County, Florida. AT&T Wireless, Nextel, Sprint, T-Mobile, and Verizon Wireless have been sued, separately, in cases brought under the Florida Deceptive and Unfair Trade Practices Act.[12] The Florida cases are based on the same legal theories as the consolidated California cases: plaintiffs assert that wireless service agreements are contracts of "adhesion"[13] and that ETFs are unconscionable and unenforceable because they are not reasonable approximations of the anticipated or actual loss caused by early terminations.[14] The Florida complaints seek disgorgement of all revenues received by the wireless carriers from the collection of ETFs[15] and "equitable relief"[16] in the form of orders enjoining the carriers from including ETF provisions in their service agreements.

See Order Granting Defendants' Motion for Summary Judgment, *Consumer Justice Found. v. Cingular Wireless, et al.*, State of California, County of Los Angeles, Case No. BC 214554, slip op. at 3-4 (Cal. Super. Ct. July 29, 2002) [Attach. as Exhibit D].

12 The cases are *Brown v. Verizon Wireless Services, LLC*, Case. No. 04-80606-CIV; *Carver Ranches Washington Park, Inc. v. Nextel South Corp. d/b/a Nextel Communications*, Case No. 50 2004 CA 005062; *Hellman v. T-Mobile, USA, Inc.*, Case No. 50 2004 CA 005061; *Graber v. AT&T Wireless PCS, LLC et al.*, Case No. 50 2004CA004650MB(AI). The Complaint filed against T-Mobile is attached as Exhibit E, as a representative example of the complaints in these cases, and will be referred to as "*Fla. T-Mobile Compl.*"

13 *Fla. T-Mobile Compl.* ¶ 16.

14 *See, e.g., Id.* ¶ 23.

15 *Id.* In the *Brown* litigation, although Verizon Wireless has moved to compel arbitration, and that motion is currently before the Court, the company nevertheless has been served with, and is in the process of responding to, discovery requests.

16 *Id.* ¶¶ 39-43.

3. Illinois

Several putative class actions seek to invalidate wireless carriers' ETFs under Illinois law in the Circuit Court for the Third Judicial Circuit in Madison County.[17] The different results reached on the preemption issue in two of these cases upon removal to federal district court illustrate the difficulties experienced by courts in applying Section 332 to ETFs in the absence of definitive FCC guidance. In *Kinkel v. Cingular Wireless,* plaintiff sought to invalidate Cingular's ETF as an illegal penalty. Cingular removed the case to federal court on the ground that state laws purporting to regulate CMRS rates are completely preempted by the Communications Act.[18] The district court granted plaintiff's motion to remand after concluding, erroneously, that the ETF was not part of Cingular's "rate-making structure" because the amount charged was not prorated depending on the duration of the contract.[19] Yet just seven months later, in *Redfern v. AT&T Wireless Services, Inc.,* the *same* federal district court denied a motion to remand a virtually identical claim, finding in effect that the ETF *was* part of the carrier's rate structure and that, therefore, plaintiff's state law challenge to the legality of the fee was

---

[17] *Redfern v. AT&T Wireless Servs., Inc.*, State of Illinois, Madison County, Case No. 03-206-GPM (3d Jud. Cir. Ct.); *Kinkel v. Cingular Wireless, LLC,* State of Illinois, Madison County, Case No. 02-999-GPM (3d Jud. Cir. Ct.); *Hall v. Sprint Spectrum L.P. et al.*, Case No. 04-L-113, State of Illinois, Madison County (3d Jud. Cir. Ct.). Also, as noted above, *Zobrist v. Verizon Wireless* is now in arbitration. The *Zobrist* complaint is attached as Exhibit F.

[18] *Kinkel v. Cingular Wireless*, Case No. 02-999-GPM (S.D. Ill.).

[19] Memorandum and Order, *Kinkel v. Cingular Wireless*, Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002) (Murphy, J.) [Slip op. attach. as Exhibit G]. The court thus relied on the very sort of analysis prohibited to it by Section 332 (c)(3)(A) – namely, the review of the amount, reasonableness, or cost basis of an ETF.

preempted.[20] In a suit brought against Sprint, a state trial judge has orally certified a nationwide class to press a challenge to the carrier's ETFs, and is expected to enter a written order shortly.[21]

To adjudicate the reasonableness and policy implications of ETFs under state law, courts must, in essence, conduct the equivalent of a regulatory rate investigation into wireless carriers' rate structures, with the prospect of ordering rebates or refunds as well as prohibiting the inclusion of any ETF in future wireless rate plans. Unless the Commission acts quickly to clarify that such actions are preempted by Section 332(c)(3)(A), suits of this nature will proliferate in state courts across the country, increasing the risk of a verdict that will effectively abolish one of the primary engines of wireless service growth.

II. SECTION 332 PREEMPTS STATE REGULATION OF ETFS.

A. Section 332 Preempts State Regulation of "Rates Charged By" Wireless Carriers.

1. Section 332 Prohibits State Regulation of Wireless Service "Rates" and "Rate Structures."

In 1993, Congress amended the Communications Act to "dramatically revise the regulation of the wireless telecommunications industry" with respect to rates.[22] These sweeping changes had two principal components. First, Congress amended Section 332 to deny the states "any authority" to "regulate the entry of or the rates charged by" any wireless service provider.[23] Second, Congress amended section 2(b) to *exclude* wireless phone services from the general

---

20 *Redfern v. AT&T Wireless Servs.*, Civ. No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003) (Murphy, J.); *see also Chandler v. AT&T Wireless Servs.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. July 21, 2004).

21 *Hall v. Sprint Spectrum L.P., et al.*, Case No. 04-L-113.

22 *Connecticut Dep't of Pub. Util. v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996).

23 47 U.S.C. § 332(c)(3)(A).

prohibition on FCC regulation of *intrastate* telecommunications services,[24] thereby exempting wireless services from the system of dual state and federal regulations that governs traditional wireline telephone services. The amendments reflected Congress's "general preference in favor of reliance on market forces rather than regulation."[25] Congress's amendments permitted the emerging wireless market to develop subject to only that regulation "for which the Commission and the states [can] demonstrate a clear-cut need."[26] This reform reflects Congress's recognition that "[s]tate regulation can be a barrier to the development of competition."[27]

Section 332(c)(3)(A) is integral to a federal regulatory framework for wireless communications which furthers several important federal objectives. These include: encouraging investment in and rapid deployment of new wireless technologies by minimizing regulatory burdens; ensuring a regulatory framework that permits the development of national enterprises by mandating "regulatory parity" across state lines; and prohibiting discrimination in rates, terms, and conditions of service among similarly-situated customers.[28]

In order to achieve these objectives, the FCC has interpreted Section 332(c)(3)(A) broadly, emphasizing that it bars state regulation of, and thus lawsuits regulating, "both rate

---

24 47 U.S.C. § 152(b).

25 *Petition of N.Y. State Pub. Serv. Comm'n To Extend Rate Regulation*, Report and Order, 10 FCC Rcd 8187, 8190 (¶ 18) (1995).

26 *Petition on Behalf of the State of Hawaii*, Report and Order, 10 FCC Rcd 7872, 7874 (¶ 10) ("*Hawaii Petition*").

27 *Petition on Behalf of the Connecticut Dep't Pub. Util. Control*, Report and Order, 10 FCC Rcd 7025, 7034 n.44 (citing H.R. Conf. Rep. No. 103-213, 103 Cong., 1st. Sess., 480-81 (1993)).

28 *See generally* 47 U.S.C. §§ 151, 161, 202, 253, 301, 332; *see also Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1419, 1422 (1994) ("*Second CMRS Report and Order*").

levels and rate structures."[29] The *Southwestern Bell Mobile* order held that Section 332(c)(3)(A) bars states from prohibiting wireless providers from charging for incoming calls or charging in whole minute increments.[30] The FCC explained:

> [W]e find that the term "rates charged" in Section 332(c)(3)(A) may include both *rate levels* and *rate structures* for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the *rate elements* for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.[31]

Thus, it is well established under FCC precedent that Section 332(c)(3)(A)'s ban on state regulation of the "rates charged by" wireless providers prohibits state regulation of "rate levels," "rate structures," and "rate elements."[32] This ban on state interference with wireless rates and structures necessarily follows from Congress's intent to "establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[33] The FCC's systematic

---

29 *Southwestern Bell Mobile System, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907 (¶ 20) ("*Southwestern Bell Mobile System*"); *see also Wireless Consumers Alliance,* Memorandum Opinion and Order, 15 FCC Rcd 17021, 17028 (¶ 13) (2000) ("*Wireless Consumer Alliance*") ("At the outset of our analysis on the preemptive scope of Section 332, we observe that Section(c)(3)(A) bars state regulation of, and thus lawsuits regulating, . . . the rates or rate structures of CMRS providers.").

30 *Southwestern Bell Mobile System*, at 19908 (¶ 23) (rate elements).

31 *Id.* at 19907 (¶ 20) (emphasis added).

32 The FCC has recognized that the Section 332 ban on regulation of "rates charged by" CMRS providers also precludes state regulation of the services for which rates are charged. *See Southwestern Bell Mobile System*, at 19907 (¶ 20); *id.* at 19906 (¶ 19) ("In interpreting this language, it should be recognized that a 'rate' has no significance without the element of service for which it applies. .... [T]he term 'rate' is defined in the dictionary as an 'amount of payment or charge based on some other amount.' In this regard also, the Supreme Court has recently stated: 'Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.'" (quoting *Am. Tele. and Telegraph Co. v. Cen. Office Tele., Inc.*, 524 U.S. 214 (1998))).

33 *Petition of the People of the State of California*, Report and Order, 10 FCC Rcd 7486, 7499 (¶ 24) ("*California Petition*"). Pursuant to this Congressional command, the Commission

implementation of this policy has promoted network expansion, high rates of investment, increased service availability, intense price competition, technical innovation, and diverse service offerings.[34]

2. Section 332 Preempts Applications of State Law Requiring Determinations of the Reasonableness of Wireless Rates or Rate Structures.

As the Commission has made clear, Section 332(c)(3)(A) prohibits states from interfering with a wireless carrier's right to "charge whatever price it wishes"[35] or taking any action to "determine the reasonableness of a prior rate" or "set a prospective charge for services."[36] Thus, a state – including a state court[37] – violates Section 332(c)(3)(A) if, in order to reach a decision, it engages in any analysis of, or hears any claim that will require an assessment of, the reasonableness of wireless rates.[38] Indeed, the FCC has found that application of otherwise

---

has repeatedly rejected state attempts to regulate wireless carriers' rates and rate structures. *See, e.g., Conn. Dep't of Pub. Util.*, 78 F.3d at 842; *see generally California Petition*; *Hawaii Petition*.

[34] *See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Ninth Report, 19 FCC Rcd 20597, 20608-09 (¶¶ 20-21) (2004) ("*2004 Competition Report*"); *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Eight Report, 18 FCC Rcd 14783, 14812, 14793 (2003) ("*2003 Competition Report*").

[35] *Wireless Consumers Alliance, Inc.*, at 17035 (¶ 27) (Under Section 332(c)(3)(A), "[a] carrier may charge whatever price it wishes and provide the level of service it wishes, so long as it does not misrepresent either the price or the quality of service.").

[36] *Wireless Consumers Alliance*, at 17041 (¶ 39); *see also Fedor v. Cingular Wireless*, 355 F.3d 1069, 1073 (7th Cir. 2004) (explaining that "state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service."); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (same).

[37] It is well established that "judicial action can constitute state regulatory action for purposes of Section 332." *Wireless Consumers Alliance, Inc.*, at 17027 (¶ 12).

[38] While state authority over wireless rates is completely preempted, wireless carriers' rates and rate structures are subject to federal review under the "unjust or unreasonable" standard set forth in 47 U.S.C. § 201(b), and the nondiscrimination requirements contained in 47 U.S.C. §

generally applicable contract or consumer protection laws may constitute preempted rate or entry regulation because "it is the substance, not merely the form" that determines whether a regulation is preempted under Section 332.[39] Accordingly, the Commission and the federal courts have rejected state attempts to exceed the limited regulatory confines of Section 332(c)(3)(A) by engaging in any assessment of the reasonableness of wireless rates.[40]

B. ETFs are "Rates" and "Rate Structures" within the Meaning of Section 332.

1. ETFs are "Rates Charged" for Wireless Service.

The ETF is a "rate[] charged by [a] commercial mobile service" under Section 332(c)(3)(A) because it is an amount of money that the customer agrees to pay a wireless provider for the services and equipment previously provided by the carrier. Wireless carriers offer service through a variety of rate plans made up of multiple components, including fees for activation, monthly access, special features, local and long distance airtime, certain roaming charges, and early termination. Taken together, the multiple rate components and various plans are designed to recover the total costs of providing wireless services over the length of the customer relationship. ETFs are charged to compensate carriers for the ongoing costs of providing wireless services, for the costs they incur in acquiring and retaining customers, and to earn a profit from these business activities. They are as much part of the "rate charged" as the

---

202(a). The FCC has found that wireless rates are presumptively reasonable and nondiscriminatory because wireless carriers lack market power in this highly competitive industry. *Second CMRS Report and Order*, at 1478 (¶ 174).

39 *See Wireless Consumers Alliance, Inc.*, at 17037 (¶ 28).

40 *See id.* at 17035 (¶ 25) (states may not make "determination[s] of whether a price charged for [wireless] service is unreasonable" or "set[ting] a prospective price for [wireless] service"); *Hawaii Petition*, 10 FCC Rcd at 7882 (state requirements that wireless carriers submit tariffs constitute impermissible rate regulation); *see also Fedor*, 355 F.3d at 1074; *AT&T Corp.*, 349 F.3d at 701.

balloon payment on a mortgage or the charge assessed for returning a leased automobile before the expiration of the full lease term.[41] Because ETFs are part of the economic exchange between the wireless carrier and the subscriber when the contract is formed, their invalidation or modification alters the price agreed to between the parties to the detriment of the wireless carrier. A state court order refunding, reducing, modifying, or eliminating ETFs is nothing more than a forced rebate or a forward-looking reduction of the price charged for service.

Wireless providers' costs for acquiring new customers are significant. They include the costs of subsidizing goods and accessories, including handset rebates and discounts, and paying direct and indirect commissions and other amounts to dealers and retailers who sell handsets and service to subscribers. Wireless providers also incur costs to provide service to customers, such as qualifying customers for the appropriate plan and equipment, running credit checks, programming phones, executing number portability requests, activating network service, setting up new accounts, counseling customers regarding the products and services providers offer, and creating and circulating service and equipment documentation. Most of the rate plans offered by wireless providers do not require customers to pay for all of these services up front, but permit the customer to pay for services gradually over the life of the customer relationship. Under a term contract, a carrier agrees to supply wireless service and, in return, the customer agrees to pay certain charges under terms and conditions set forth in the parties' agreement. All of the specified charges, including the ETF, are rates because they are part of the total consideration the

---

[41] It is immaterial for purposes of the analysis of the ETF as a part of wireless carriers' rate structure whether, as a matter of contract law, the ETF is viewed as a conditional payment for the handset or services, as a reasonable approximation of lost profits, as reliance damages of the carrier, or as some other proper measure of contract damages to make the carrier whole for services and goods delivered and accepted by the subscriber.

customer agrees to provide in exchange for service. And these various charges are rates regardless of how or when they are imposed[42] or whether they are conditional.[43]

Federal courts have recognized that, because the ETF is a charge assessed for the provision of wireless services, it is a "rate" for purposes of Section 332(c)(3)(A). In *Aubrey v. Ameritech Mobile Communications, Inc.*,[44] a federal district court held that a plaintiff's challenge to an ETF was preempted because the ETF itself was a "rate charged." The court reasoned that by "alleging that the rates which [the carrier] charged for terminating a subscriber's service were exorbitant, it [was] clear that the Plaintiff [was] challenging the *rates charged* by [the carrier] for its wireless services."[45] The court likewise noted that because prohibiting the defendant from utilizing an ETF would be the same as "obligat[ing]" the defendant to adjust its rates, the

---

[42] Some charges, such as those for roaming or downloads, may be assessed on a per-use basis. Other charges, such as monthly recurring charges, may be assessed on a per-month basis regardless of use. Still others, such as the ETF, may be assessed at the end of the customer-provider relationship on a per-contract basis. And finally, some charges, such as those for activation, may be charged at the inception of the customer-provider relationship on a per-subscriber basis. The various charges contained in provider contracts are not all assessed in connection with the use of specific services, but they are all part of the total price the customer agrees to pay in order to enjoy wireless service. In other words, they are all rates.

[43] Some charges, such as activation fees and monthly recurring charges, are imposed on and paid by most or all customers who enter into a contract that provides for such fees. Other charges, such as ETFs, charges for exceeding the monthly allotment of minutes, and pay-per-use charges, are contingent on the customer's actions, and many customers may never become subject to them. The customers who do become obligated to pay such charges are paying for services rendered under a contract; the charges are part of the price of service and are therefore rates.

[44] No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002).

[45] *Id.* at *12 (emphasis added).

plaintiffs' "claims, which relate to . . . the rates that are attendant to *providing* [cellular] services" were preempted.[46]

Thus, ETFs, like other charges in wireless provider contracts, are "rates charged" under Section 332(c)(3)(A) because they are part of the price customers agree to pay for wireless service and because they are part of the carriers' overall program for attempting to recover the

---

[46] *Id.* (emphasis added). Several other federal courts recognize that challenges to ETFs are preempted rate regulation. In *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 923-25 (N.D. Ill. 2001), the court ruled that a challenge to a "Corporate Account Administrative Fee" was preempted, where plaintiff alleged that the fee, added to his monthly bill after he had already been a customer for a period of time, was not tied to any significant, recognizable service provided by the carrier. The court held that in determining if a fee was a "rate charged," the focus was "on whether the appropriateness of the amount charged is necessary to resolving the claim." *Id.* at 923. Because the claims "explicitly raise[d] the issue of whether [the plaintiff] received sufficient services *in return* for the fee," it was a "rate issue" and a "rate challenge." *Id.* at 924 (emphasis added). In *Redfern*, 2003 U.S. Dist. LEXIS at *2-4, the court concluded that because the ETF "directly correlated to and is an integral part of the rates charged by [a wireless provider] for its services under its wireless service agreements," a plaintiff's claims challenging the legality of the ETF were "completely preempted." In "agree[ing] with Defendant that the early termination fee affects the rates charged for mobile service," the *Redfern* court emphasized that "contracts without an expiration date, e.g., prepaid contracts, do not include an early termination fee" yet have "higher" rates. *Id.* In *Chandler*, 2004 U.S. Dist. LEXIS at * 3, the court reasoned that "lower rates are offered on term plans because the early termination fee accounts for planned future earnings" and thus it "seems clear" that the ETF "is directly connected to the rates charged for mobile services." The court concluded that the plaintiff's claim that the ETF was an illegal penalty was "preempted by federal law." *Id.* at * 4. In *Consumer Justice Foundation*, Case No. BC 214554 at * 4, the court granted summary judgment to the defendant on the basis of preemption because the ETF was "*inextricably linked* to the rates charged by [the defendant] for providing those wireless services" and because ETF was "designed to enable [the defendant] to recover the origination costs incurred at the beginning of the contractual relationship with the customer" (emphasis added). Finally, in *Simons v. GTE Mobilnet*, Civ. No. H-95-5169 at *5-6 (S.D. Tex. April 11, 1996), the court granted defendant's Rule 12 motion in a case challenging ETFs as illegal penalties under Texas law. "[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A) of the FCA [Federal Communications Act]."

These judicial decisions are consistent with the Commission's own prior rulings, which establish that ETFs are part of the overall price paid for the handset and service and are a "rate element" that is tied to and interdependent with every other element of the entire rate structure. *See* discussion of FCC precedent, *supra* at 8 to 11 and *infra* at 16-19. The courts that have concluded otherwise, *see, e.g. Phillips v. AT&T Wireless*, No. 04-CV-40240, 2004 WL 1737385 (S.D. Iowa July 29, 2004) and *Esquivel v. Southwestern Bell Mobile Sys.*, 920 F. Supp. 713 (S.D. Tex. 1996), have either confused complete preemption for purposes of removal jurisdiction with preemption *vel non*, or have simply ignored the plain language and purpose of Section 332(c)(3)(A) and the decisions of the Commission.

costs of providing service. The pending state court ETF litigation directly challenges wireless carriers' ability to assess rates for services provided, as these cases all boil down to the allegation that ETFs are simply "too high." As such, the claims directly attack the magnitude of the ETF rate – which is an effort to regulate "rate levels" that Section 332(c)(3)(A) flatly prohibits.

2. ETFs Are Also Integral Components of Wireless Rate Structures.

Separate and apart from whether ETFs are "rates," state court litigation challenging ETFs is preempted by Section 332(c)(3)(A) because ETFs are an integral component of the rate structures pursuant to which wireless service is provided to the vast majority of subscribers. Even if an ETF were not itself a "rate," it is part of the carriers' rate structure such that a state law limitation on the ability to impose ETFs would force the carrier to change other rates in order to recover its costs, resulting in rate regulation prohibited by Section 332(c)(3)(A). Indeed, the fact that other rate elements would have to be adjusted upward in response to an order in favor of the plaintiffs in the pending cases conclusively demonstrates that ETFs are part of the overall rate charged within the meaning of Section 332(c)(3)(A).

ETFs play a central role in the setting of prices for wireless services. ETFs enable carriers to offer customers lower up front costs in exchange for a commitment to a term contract. The longer assured commitment under these term contracts enables the carriers to reduce handset prices at the inception of the term and to reduce monthly service charges, based on the expectation that initial and ongoing costs can be recouped gradually over time. This expectation is based, in turn, on the existence of the ETF, without which the transaction costs of suing customers for damages resulting from breach would be prohibitive. Customers have overwhelmingly demonstrated their preference for term contracts with ETFs as compared to

prepaid or postpaid plans without term commitments but with higher up front costs for handsets and/or higher service prices. Prohibiting carriers from imposing ETFs would severely limit their ability to offer consumers these choices of different kinds of rates structures.

The FCC has recognized that ETFs play a beneficial role in the structure of rate plan offerings. Indeed, the ability of wireless carriers to charge for early termination is a fundamental premise of, and inextricably linked with, the price levels of other elements of wireless service rate plans. In the 1995 *California Petition*, the California Public Utilities Commission ("CPUC") petitioned the FCC to retain state regulatory authority over the rates for intrastate wireless services.[47] The FCC denied the CPUC's request and correctly observed the unavoidable relationship between termination fees and wireless rates:

> Although the two major standard components of cellular prices are monthly, flat-rate access charges and per-minute airtime charges, customer bills are driven in part by other variables, including "free" airtime offered with certain pricing plans, *termination charges* (if any) and contract length (monthly or for a period of months or years).[48]

Wireless providers' costs for acquiring new customers are significant. They include the costs of subsidizing handset rebates and discounts, programming phones, activating network service, and paying direct and indirect commissions and other amounts to dealers and retailers who sell handsets and service to subscribers.[49] Most of the rate plans offered by wireless

---

47 *California Petition*, at 7486 (¶ 1).

48 *Id.* at 7536 (¶ 112) (emphasis added).

49 Some or all of the costs of acquisition may be incurred by a provider when a customer renews a contract, depending upon such factors as the customer's reason for contract renewal, the nature of the contract renewal, and the components of the bargain reached with the customer. Wireless providers often offer existing customers new, subsidized handsets, more attractive rate plans, and other discounts or promotions when they renew their contracts. The length of time

providers do not require customers to cover these costs up front, but instead permit the customer to reimburse the carrier for such costs gradually over the life of the customer relationship. If the customer terminates their contract prematurely, the carrier is deprived of the monthly revenue required to recover the remaining portion of the up front costs that have been spread over the term of the contract. By providing an alternative means of recovering these costs, ETFs mitigate this loss, and thus preserve the economic viability of rate plans based upon term contracts.

The FCC has aptly characterized the nature of ETFs in the wireline context:

> [E]arly termination charges [are] . . . a valid quid pro quo for the rate reductions included in long-term price plans. . . . because carriers must make investments and other commitments associated with a particular level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to allocate the risk of investments associated with long term service arrangements with their customers.[50]

The importance of ETFs to rate plans based upon minimum term commitments is illustrated by examination of the rate structures of other plans offered by wireless carriers. Under month-to-month prepaid plans, which do not require a term commitment, wireless carriers typically offer lower subsidies to reduce the purchase price of handset equipment because the customers have not made a commitment to use wireless services for any minimum time. In addition, although prepaid subscription plans present less credit risk than post-paid plans,

---

required to recoup costs of customer acquisition varies with the price plan and with individual usage.

[50] *In re Ryder Communications, Inc. v. AT&T Corp.*, File No. EB-02-MD-038, slip op. ¶ 33 (FCC rel. July 7, 2003). *Cf. Telephone Number Portability*, at 20976 (¶ 14) (noting that ETFs allow wireless carriers to hedge against unmitigated customer migration and "recover[] their investment in their customers").

wireless carriers generally charge higher monthly service fees for prepaid service, due to the absence of a minimum contractual commitment. When wireless carriers have offered postpaid contracts on a month-to-month basis with no ETF, rate structures for those contracts have also included higher handset costs or service charges to compensate for the shorter expected contract duration. In contrast, the ETF included in one-year and two-year price plans enables carriers to reduce handset prices at the inception of the term and to reduce monthly service charges, based on the expectation that initial and ongoing costs can be recouped, if not from monthly payments during the contractual relationship, then through the ETF. In addition, the ETF permits the wireless provider to recover planned future earnings, i.e., some of the revenue lost as a result of the customer's breach of the contract.

The basic economics supporting ETFs have been approved by the Commission and confirmed by the federal courts. In the context of wireline tariff rates, the D.C. Circuit, in upholding Commission decisions to allow termination or cancellation fees, has recognized that such fees are part of "rates" because they aid in cost recovery in the event of premature contract termination. As the D.C. Circuit explained:

> We cannot gainsay the Commission's determination that the [relevant] cancellation and discontinuance charges are part of the "rates" established for voice grade facilities under the terms of the Agreement. A "rate" is a charge to a customer to receive service. *See generally* Black's Law Dictionary 1134 (5th ed. 1979). Public utility rates are a means by which the carrier recovers its costs of service from its customers. Part of AT&T's cost of providing private-line service is the cost incurred from last-minute cancellation of orders and early termination of service. These acts result in customers' not paying rates sufficient to cover the cost of filling the orders and often subject AT & T to additional costs while facilities lie idle. In the past, AT&T recovered these costs by raising its general rates for private-line service, thereby spreading the costs among all ratepayers. The [cancellation and discontinuance] charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT & T to incur the costs. This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service. We therefore conclude that

> the Commission reasonably found that the . . . charges are "rates" within the meaning of the Agreement.

MCI Telecomms. Corp. v. FCC, 822 F.2d 80, 86 (D.C. Cir. 1987).

Similarly, in *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987), the D.C. Circuit rejected a challenge to a Commission order declining to find that early termination clauses were anticompetitive. In so doing, the court reasoned that,

> [s]ince the contractual lease, unlike the indefinite month-to-month leasing arrangement, required the customer to hold the equipment for a fixed term and to pay a fixed monthly amount toward expenses and capital costs, it gave rise to an assured revenue stream for expense and capital recovery that enabled the telephone companies typically to set the monthly rate under the contract below the level a month-to-month arrangement would require.... The charges were imposed because premature termination, by cutting short the revenue stream contemplated by the contract, would otherwise result in a cost recovery below that assumed in the calculated monthly charges.

Id. at 1199 (emphasis added).

In sum, the use in a long-term service contract of lower up front costs coupled with an ETF is a part of wireless carriers' "rate structure" within the meaning of Section 332. Eliminating or modifying an essential element of a carefully calibrated rate plan obviously targets a wireless carrier's "rate structure" and is a form of "regulation" with the meaning of Section 332(c)(3)(A).

3. State Regulation of ETFs Is Not Saved from Preemption Under Section 332 as Regulation of "Other Terms and Conditions".

Though it should be plain that the use of state law to evaluate the reasonableness of ETFs is preempted by Section 332(c)(3)(A), some parties, such as the plaintiffs seeking to regulate ETFs through state class actions, will no doubt argue that such regulation is permitted by the statute's provision that the prohibition of state rate and entry regulation "shall not prohibit a State

from regulating the other terms and conditions of commercial mobile services."[51] This argument lacks merit. Indeed, the Commission can resolve CTIA's Petition without even addressing the meaning and scope of the exceptions clause in Section 332(c)(3)(A).[52] ETFs are rates and an element of rate structures. State action modifying or invalidating that rate element is rate regulation – period.

Even if analysis under the exceptions clause were necessary, case law and Commission precedent confirm that the ETF actions at issue do not concern "other terms and conditions" of service. The state lawsuits described above do not seek enforcement of laws that simply require disclosure of rates and billing practices.[53] There is no credible claim in these class action lawsuits that the ETFs were not clearly disclosed at the point of sale and in the standard wireless contract itself. Similarly, the cases described herein do not ask state courts merely to compare a carrier's "promise versus performance."[54] To the contrary, they seek to invalidate, modify, or condition the use and enforcement of ETFs, as explained above.

---

51 47 U.S.C. § 332(c)(3)(A).

52 *See Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 988 (7th Cir. 2000) (in analyzing preemption under Section 332(c)(3)(A), "study of the phrase 'other terms and conditions'" unnecessary where "meaning of 'entry of or rates charged by any commercial mobile service' adequately resolves the issue").

53 *See e.g., In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp. 2d 838, 848 (W. D. Mo. 2004); *see also Ball v. GTE Mobilnet of California*, 81 Cal. App. 4th 529, 543 (2000) (holding that while "section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice," it does "preempt[] a state law action challenging the reasonableness or legality of the particular rate or *rate practice* itself") (emphasis added).

54 *See AT&T Corp.*, 349 F.3d at 701 (recognizing that state courts may not determine the reasonableness of rates but holding that state courts may inquire into the existence of, and compliance with, a contract); *Union Ink Co. v. AT&T Corp.*, 801 A.2d 361, 376 (N.J. Super. Ct. App. Div. 2002) (holding that claims regarding whether a service was provided in accordance with the terms of the contract may be appropriately reviewable in state court because the court need not inquire into reasonableness of the charges).

Nor do these cases present a situation in which state damages awards are not necessarily the equivalent of rate regulation because those awards had only an "uncertain" and "indirect" effect on CMRS prices,[55] and were based upon acts or omissions *other than* the setting of the rate itself or the choice of rate structure. A challenge to an ETF simply cannot be characterized as "incidental" to rates.[56] The state law claims addressed herein allege that ETFs are excessive in relation to the actual costs, damage, or harm to the carrier from the early termination.[57] There can be no more direct challenge to rates than a cause of action predicated on an allegation that a charge is excessive. The reason that these state court actions are preempted is not that they increase wireless carriers' costs of doing business, but that they threaten to withdraw carriers' ability to establish rates, and to design rate structures, that enable them to recover the costs they necessarily incur in providing service. While these suits are cloaked in the garb of various equitable theories or statutory causes of action, for a state court to find in plaintiffs' favor would require the court to declare that a wireless carrier's rates are too high or that its rate structure is unfair. Such determinations are the essence of rate regulation and thus go to the heart of Section 332 preemption.

In short, state-level litigation over the reasonableness of ETFs is not the type of "neutral application of state contractual or consumer fraud laws"[58] or incidental damages award that the

---

55 *See, e.g., Wireless Consumers Alliance*, at 17034 (¶ 23).

56 *See id.* at 17041 (¶ 38).

57 *See, e.g., Cal. AT&T Compl.* ¶ 39; *Fla. T-Mobile Compl.* ¶ 23-24; *Ill. Verizon Compl.* ¶ 28.

58 *Southwestern Bell Mobile System*, at 19903 (¶ 10).

Commission has determined is not preempted by Section 332(c)(3)(A).[59] Rather, these lawsuits directly attack the substance and operation of ETFs and, as such, are preempted rate regulation, and *not* regulation of other terms and conditions.

C. Applications of State Law That Require an Assessment of the Reasonableness of Wireless Rates, Including ETFs, Are Preempted by Section 332(c)(3)(A).

As noted above, the FCC has emphasized that claims requiring a state court to determine the reasonableness of a rate or rate component are preempted: "a court will overstep its authority under Section 332 if ... it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services."[60] Section 332(c)(3)(A) therefore preempts challenges to wireless carriers' rates and rate elements on the basis of state statutory and common-law "equitable" doctrines that examine whether a particular charge is unfair, unjust, unreasonable, unconscionable, or not reasonably related to the costs it is intended to recover.

The pending state court suits based on state law claims that seek to invalidate or modify ETFs do not generally seek interpretation or enforcement of the wireless service contract as it exists or argue that the carriers failed properly to disclose the ETF. Rather, plaintiffs in these actions claim that ETF clauses *should not be enforced* because their terms are essentially "unfair."[61] To make their case, plaintiffs rely on a host of statutory, equitable, and quasi-contract doctrines (such as unconscionability, illegal penalties, quantum meruit, and unjust

---

59 *See Wireless Consumers Alliance,* at 17025 (¶ 8); *Petition of the State Indep. Alliance*, 17 FCC Rcd 14802, 19821 n.119 (2002).

60 *Wireless Consumers Alliance,* at 17041 (¶ 39); *see id.* at 17027 (¶ 12).

61 *See e.g., Cal. AT&T Compl.* ¶ 63-65; *Fla. T-Mobile Compl.* ¶ 40.

enrichment) that require the state court to determine whether an otherwise valid ETF should be overturned as unreasonable.[62] Plaintiffs also utilize state unfair competition and consumer protection statutes as vehicles for these same direct attacks on either the existence or size of the ETF charge. Every one of these theories of liability rests on an unavoidably fact-intensive "reasonableness" inquiry that is inherently incompatible with Section 332(c)(3)(A)'s preemptive force.[63] Indeed, every one of the state court plaintiffs' theories entails a direct attack on the magnitude of wireless carriers' ETF rates, because a basis for each of plaintiffs' claims of unreasonableness is that the ETFs are too high. Thus, the plaintiffs are asking state courts to engage in an effort to regulate "rate levels" that section 332(c)(3)(A) directly prohibits.[64]

Examples of the equitable doctrines often employed in suits challenging ETFs' "reasonableness" are: (1) unconscionability; (2) illegal penalties; and (3) quasi-contract. Unconscionability, the most common equitable doctrine used to overturn a contractual provision, requires "absence of meaningful choice on the part of one of the parties together with contract

---

[62] Even breach of contract claims that seek such an interpretation may run afoul of Section 332(c)(3)(A) if the calculation of damages requires the courts to evaluate the ETF's reasonableness. *See Wireless Consumers Alliance*, at 17041 (¶ 39) ("Of course, a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.").

[63] It is important to note that *any* doctrine that demands an assessment of an ETF's "reasonableness" runs afoul of Section 332(c)(3)(A). The specific equitable doctrines discussed herein thus serve as useful examples in revealing a more fundamental tension between certain common law equitable doctrines – *i.e.*, claims that require a "reasonableness" assessment – and Section 332(c)(3)(A). Here, these doctrines are particularly useful examples because they form the basis of the state court lawsuits that necessitated this request for an expedited ruling.

[64] *See Southwestern Bell Mobile Systems*, at 19907 (¶ 20) (holding state regulation of "rate levels" prohibited).

terms which are unreasonably favorable to the other party."[65] The equitable defense of unconscionability thus encompasses both a procedural and substantive component that, typically, must each be satisfied.[66] Courts have routinely explained that "substantive unconscionability" is merely a euphemism for an "unfair" or "unreasonable" contractual provision.[67] As for claims grounded in procedural unconscionability, many courts also undertake a substantive "reasonableness" inquiry as part of that cause of action.[68]

---

65 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 18:9 (4th ed. 2004) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965)); *see e.g., Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002) *Beaver v. Grand Prix Karting Ass'n, Inc.*, 246 F.3d 905, 910 (7th Cir. 2001); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792-93 (8th Cir. 1998); *Arrowhead Sch. Dist., No. 75, Park County v. Klyap*, 79 P.3d 250, 263 (Mont. 2003); *Woodfield v. Providence Hosp.*, 779 A.2d 933, 937 (D.C. 2001); *Antz v. GAF Materials Corp.*, 719 A.2d 758, 761 (Pa. Super. Ct. 1998).

66 WILLISTON ON CONTRACTS § 18:10; *see also e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003) (interpreting Ohio law); *Circuit City Stores v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (interpreting California law); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181-82 (3d Cir. 1999) (interpreting Pennsylvania law); *Murphy v. Mid-West Nat'l Life Ins. Co of Tenn.*, 78 P.3d 766, 768 (Idaho 2003); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983-84 (Cal. 2000); *Hubscher & Sons, Inc. v. Storey*, 578 N.W.2d 701, 703 (Mich. App. 1998). Only a few states have ruled that either procedural or substantive unconscionability is sufficient to find a contractual provision unenforceable. *See e.g., East Ford, Inc. v. Taylor*, 826 So.2d 709, 714 (Miss. 2002); *World Enters., Inc. v. Midcoast Aviation Servis.*, 713 S.W.2d 606, 610-11 (Mo. Ct. App., 1986).

67 *Jeffrey Mining Prods. L.P. v. Left Fork Mining Co.*, 758 N.E.2d 1173, 1180-81 (Ohio Ct. App. 2001); *Maxwell v. Fid. Fin. Servs..*, 907 P.2d 51, 58 (Ariz. 1995) ("Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed."); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 504 (6th Cir. 2004) (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996)) ("A contract is substantively unconscionable . . . when its terms 'are beyond the reasonable expectations of an ordinary person, or oppressive'"); *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.*, 680 N.E.2d 240, 243 (Ohio Ct. App. 1996) (citation omitted) (emphasis in original) ("Substantive unconscionability involves those factors which relate to the *contract terms themselves* and whether *they* are commercially reasonable."); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1102 (W.D. Mich. 2000) (citing *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 323 (6th Cir. 1998)) (other citations omitted) (a "[d]etermination of whether a contract provision is substantively unconscionable rests on whether the provision is substantively reasonable.")

68 Several of the state court lawsuits argue that the ETFs are procedurally unconscionable. *See, e.g., Cal. AT&T Compl.* ¶ 32, *Fla. T-Mobile Compl.*, ¶ 16. Labels aside, many of the

Illegal penalty claims, which challenge ETFs as unlawful liquidated damages provisions, are likewise preempted. "[C]ontracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced."[69] Under this theory, the ETFs' "reasonableness" – including the amount of the ETF in relation to actual damages – determines whether the provision is a valid liquidated damages clause, on the one hand, or an illegal penalty on the other.[70] Because "'reasonableness is the touchstone' for determining whether [a] liquidated damages clause is enforceable," this cause of action is preempted under section 332(c)(3)(A).[71] Furthermore, even "if the service charge is a void liquidated damage, [the non-breaching party] is still entitled to recover its actual damages."[72] Thus, a state court evaluating an ETF under this legal theory would have to engage in a reasonableness inquiry to assess actual damages and modify the size of the ETF accordingly. Accordingly, this is exactly the kind of superintendence over rates that

---

procedural unconscionability claims involve the very type of reasonableness inquiry regarding the ETF itself that is prohibited by Section 332(c)(3)(A). *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600-01 (1991).

69 *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) (internal citations and quotations omitted).

70 *See e.g., Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*, 387 F.3d 705, 716 (8th Cir. 2004) (interpreting Iowa law); *Energy Plus Consulting v. Ill. Fuel Co.*, 371 F.3d 907, 909 (7th Cir. 2004) (interpreting Illinois law); *U.S. Fid. and Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 71 (2d Cir. 2004) (interpreting New York law); *Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 472 (8th Cir. 2004).

71 *Miami Valley Contractors, Inc. v. Town of Sunman, Ind.*, 960 F. Supp. 1366, 1375 (S.D. Ind. 1997) (quotation omitted).

72 *Ballard v. Equifax Check Servs.*, 158 F. Supp. 2d 1163, 1175 (E.D. Cal. 2001) (citation omitted).

this Commission has consistently found to constitute prohibited state "rate regulation" expressly preempted by Section 332(c)(3)(A).

Quasi-contract claims, another common element of ETF challenges, necessarily require this same "reasonableness" assessment. "Quasi contractual obligations are imposed by the courts for the purpose of bringing about a just result without reference to the intention of the parties."[73] Quasi-contract claims – whatever the moniker – thus turn on the same basic criteria. In all cases, the plaintiff must show: "(1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention of the benefit by the defendant under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value."[74] The court must therefore, without regard for the express contractual language, determine if the benefit obtained should be returned based on principles of equity.[75] Again, this places a state court in the position of adjudicating the "reasonableness" of an existing price term in a wireless contract and replacing it

---

[73] WILLISTON ON CONTRACTS § 1:6.

[74] WILLISTON ON CONTRACTS § 68:5 (citation omitted); *see e.g., Dove Valley Bus. Park Assocs., Ltd. v. Bd. of County Commr's*, 945 P.2d 395, 403 (Colo. 1997) (unjust enrichment and contract implied in law); *Eisele v. Rice*, 948 P.2d 1360 (Wyo. 1997) (quantum meruit); *Sauner v. Pub. Serv. Auth.*, 581 S.E.2d 161, 168 (S.C. 2003) (restitution).

[75] *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 60 (2d Cir. 1997) ("[C]laims for unjust enrichment or quantum meruit do not hinge on the existence of an agreement, oral or otherwise."); *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 285 (N.J. 1992) (citations and quotations omitted) ("[Q]uasi-contractual [recovery] . . . rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another."); *Pollak v. Staunton*, 293 P. 26, 30 (Cal. 1930) ("The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain."); *Minsky v. City of Los Angeles*, 520 P.2d 726, 732 (Cal. 1974) ("Plaintiff's second cause of action, for money had and received, finds its basis in principles of implied contract and unjust enrichment."); *Maglica v. Maglica*, 66 Cal. App. 4th 442, 449 (Cal. App. 1998) ("The underlying idea behind quantum meruit is the law's distaste for unjust enrichment.").

with a term dictated by principles of equity under the state law of quasi-contract. As the Commission noted in its declaratory ruling in the *Sprint PCS Access Charge* matter, because "*an award of quantum meruit would require the court to establish a value (i.e., set a rate) for the service provided* . . . there is a substantial question whether a court may award *quantum meruit* or other equitable relief under state law without running afoul of section 332(c)(3)(A)."[76] Interpreting this ruling, the D.C. Circuit explained that the FCC "left little room for confusion ..., strongly suggesting that a claim based on quantum meruit is preempted."[77]

Moreover, in some actions,[78] the state court complaints attempt to plead statutory violations that either codify existing common law remedies, or prohibit a broad array of "unfair" practices, by including theories that are based on the aforementioned common law claims. A state law claim is preempted, however, whenever it would modify or eliminate an ETF based upon some judgment of reasonableness or cost-justification, whether the claim emanates from common law or from a state statute, and regardless of the label placed upon the claim. Obviously, using a state statute to artfully plead a common law claim for relief that challenges

---

[76] See *Petition of Sprint PCS and AT&T Corp.*, Declaratory Ruling, 17 FCC Rcd 13192, 13198 n.40 (¶ 13) (2002) (emphasis added) (citing *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 986 (7th Cir. 2000)); *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d at 925; *see also AT&T Corp.*, 349 F.3d at 700-02.

[77] *AT&T Corp.*, 349 F.3d at 701.

[78] *See e.g., Fla. T-Mobile Compl.* ¶ 26. This is particularly true with the respect to the class action suits pending in California which, relying on a number of California statutes, allege that the "early termination fees imposed by all the defendants constitute unlawful penalties that are void and unenforceable as a matter of California law . . .." *See Cal. AT&T Compl.* ¶¶ 39-80.

the "fairness" or "reasonableness" of an ETF cannot save the cause of action from preemption by Section 332(c)(3)(A).[79]

In the end, *any* claim that demands a "reasonableness" inquiry with respect to a "rate" or a carrier's rate structure runs afoul of Section 332(c)(3)(A) and is preempted. Unconscionability, illegal penalty, and quasi-contract claims are prime examples of equitable claims that fall within this federal prohibition. Furthermore, statutory claims that essentially duplicate these prohibited causes of action, or that by their very nature require an inquiry into the basis, cost justification, or fairness of an ETF are likewise preempted. Accordingly, the FCC should make clear in its declaratory ruling that these, and any other state law claim that requires a "reasonableness" assessment of an ETF are preempted under Section 332(c)(3)(A).

III. THE FCC MUST ACT SWIFTLY AND DECISIVELY TO CLARIFY THE EXCLUSIVE FEDERAL JURISDICTION OVER ETFS AND TO PROTECT WIRELESS CARRIERS FROM PIECEMEAL RATE REGULATION BY THE STATE COURTS.

The highly competitive wireless industry increasingly prices, markets, and provides its services on a nationwide basis. To comply with potentially inconsistent rate requirements, wireless providers might be required to withdraw or revise their nationwide service offerings. State-by-state invalidation or limitation of ETFs will force wireless providers to reevaluate their current plan offerings, raise initial prices for consumers, eliminate handset subsidies, or compel other rate changes that would harm wireless consumers. Because the law of each state is different, and state courts may arrive at disparate measures of the size or legality of ETFs, these

---

[79] CTIA does not contend all state unfair competition or consumer protection statutes are preempted in all their applications. Rather, CTIA lists these provisions because inventive pleading and stretching of statutory protections in ETF cases, have allowed plaintiffs lawyers to confuse many courts in attacks on ETFs. Where a state law claim would modify or eliminate an ETF based upon some judgment of reasonableness or cost-justification it is preempted.

lawsuits threaten the very national uniformity and respect for competitive market forces that both Congress and this Commission have made the centerpiece of their (successful) policy to promote wireless services.[80]

CTIA respectfully requests that the Commission address this Petition on an expedited basis to provide wireless carriers, wireless subscribers, and state and federal courts across the country with much needed clarification of this critical issue of federal law and federal policy. Without clear FCC guidance, courts have reached inconsistent conclusions about the scope and operation of federal preemption under Section 332.[81] The class actions currently pending in state courts threaten to abolish the use of ETFs in multiple jurisdictions or even nationwide, and thus destroy the rate structure that has produced the ubiquitous deployment, innovative services, affordable prices, and soaring subscribership that has characterized the wireless industry. Indeed, the resultant patchwork of state ETF rules would disrupt national and regional advertising and promotions, causing consumer frustration as potential subscribers were subjected to differing rates and plan options. Prompt action is required in order to avoid the rate shock, customer confusion, and disruption of carrier operations that would result from a verdict in favor of a regional or national plaintiff class in any of these cases. If the FCC declines to act quickly,

---

[80] *Cf. In re Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16872 (1998) (¶ 30) ("since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs [if parties resorted to the courts for relief from alleged unjust and unreasonable practices]. This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c)") (footnotes omitted).

[81] *Compare Phillips*, 2004 WL 1737385 (S.D. Iowa July 29, 2004) and *Esquivel*, 920 F. Supp. at 715 (ETF is a "term and condition" – not a "rate" – and therefore is not preempted) *with Chandler*, 2004 U.S. Dist. LEXIS at *5 and *Redfern*, 2003 U.S. Dist. LEXIS at *3 (ETF "affects the rates charged . . . and thus, the Plaintiff's challenge to the fee is completely preempted[.]").

it will allow state courts and other state authorities to decide improperly vital issues of national importance that lie within the exclusive province of the FCC under the Communications Act.

The FCC's actions in litigation concerning improper state regulation of voice over Internet protocol technology ("VoIP") are instructive. There, while litigation over the status of VoIP as an information or telecommunication service was pending, the FCC issued a Declaratory Order and Opinion preempting the state PUC from imposing its proposed regulations on a litigant, because "[t]here is a significant public interest in ensuring that the FCC's regulatory authority is not impaired by premature judicial resolution of these issues."[82] The importance of national regulation of these uniquely interstate services "compelled" the Commission to preempt the Minnesota Public Utilities Commission's regulation of VoIP because such regulation "could severely inhibit the development" of such services.[83] The same logic applies to the present attack on ETFs. In preempting Minnesota's regulation of VoIP, the FCC explicitly analogized VoIP to wireless service, stating that VoIP is "far more similar to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues."[84] The case for declaratory action is even stronger in the case of wireless services, because Congress has *already decided*, through the mechanism of Section 332, that wireless

---

82 *Brief Amicus Curiae of the FCC, Vonage Holdings Corp. v. Minnesota Public Utilities Comm'n*, (8th Cir. No. 04-1434).

83 *Vonage Order* at (¶ 20).

84 *Id.* ¶ 22 (emphasis omitted). The Eighth Circuit relied on that Declaratory Order to dispose of the case. *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) ("Because we conclude that the FCC Order is binding on this Court and may not be challenged in this litigation, we now affirm the judgment of the district court on the basis of the FCC Order.")

rates must exist in a uniform federal regulatory environment that allows market forces to operate with little or no governmental interference.

IV. CONCLUSION

For the reasons stated above, and those included in any further comment authorized in this docket, CTIA respectfully requests that the Commission act expeditiously to clarify the law by issuing a declaratory ruling confirming that: (1) ETFs are "rates charged" for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful "liquidated damages" or penalties, constitutes prohibited rate regulation and is therefore preempted by Section 332(c)(3)(A).

Respectfully submitted,

Michael Altschul
Senior Vice President, General Counsel
CTIA - The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Dated: March 15, 2005